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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION**

10
11 CARLOS ANTHONY HAWTHORNE,
12 Petitioner,
13 v.
14 PAT HORN,¹
15 Respondent.

Case No. CV 22-7535-FWS (AS)

**REPORT AND RECOMMENDATION OF A
UNITED STATES MAGISTRATE JUDGE**

16
17 This Report and Recommendation is submitted to the Honorable
18 Fred W. Slaughter, United States District Judge, pursuant to 28
19 U.S.C. § 636 and General Order 05-07 of the United States District
20 Court for the Central District of California.

21
22 **INTRODUCTION**
23

24 On October 17, 2022, Carlos Anthony Hawthorne
25 ("Petitioner"), a California state prisoner represented by counsel,

26
27 ¹ Pat Horn, the Acting Warden at California State Prison - Los
28 Angeles County, in Lancaster, California, where Petitioner is
currently incarcerated, is substituted for former Warden Raybon
Johnson as the proper Respondent. (See Dkt. No. 16 at 1 n.1).

1 filed a Petition for Writ of Habeas Corpus by a Person in State
2 Custody pursuant to 28 U.S.C. § 2254 ("Petition"), challenging
3 Petitioner's conviction and sentence in Los Angeles County Superior
4 Court case number BA137272 on fourteen different grounds. (Dkt.
5 No. 1).

6
7 On March 10, 2023, Respondent filed a Motion to Dismiss the
8 Petition ("Motion to Dismiss") with an accompanying memorandum of
9 points and authorities ("MTD Mem."), contending that dismissal is
10 warranted for failure to exhaust the Petition's Grounds Eleven,
11 Twelve, and Thirteen and part of Ground Fourteen. (Dkt. No. 16).
12 Respondent also lodged documents from Petitioner's state
13 proceedings ("Lodgment(s)"). (Dkt. No. 17).

14
15 On June 12, 2023, Petitioner filed an opposition to the motion
16 to dismiss and a motion for stay and abeyance ("Motion for Stay")
17 pursuant to Rhines v. Weber, 544 U.S. 269 (2005). (Dkt. No. 21).
18 On June 26, 2023, Respondent filed an Opposition to the Motion for
19 Stay, along with supplemental lodgments, including a six-volume
20 Clerk's Transcript ("CT") and ten-volume Reporter's Transcript
21 ("RT") from Petitioner's state trial court proceedings. (Dkt. Nos.
22 23-24). On July 5, 2023, Petitioner filed a Reply. (Dkt. No. 25).

23
24 For the reasons stated below, it is recommended that (1) the
25 Motion to Dismiss be granted to the extent it seeks dismissal of
26 the Petition's unexhausted claims; (2) the Motion for Stay be
27 denied; and (3) Grounds Eleven, Twelve, and Thirteen and part of
28

1 Ground Fourteen be dismissed without prejudice for lack of
2 exhaustion.

3
4 **PROCEDURAL HISTORY**

5
6 On July 25, 1997, a Los Angeles County Superior Court jury
7 found Petitioner guilty of the first-degree murder of Vanessa Sells
8 (California Penal Code ("P.C.") § 187(a)), the attempted murder of
9 Kristian F. (P.C. §§ 187, 664), the first-degree robbery of both
10 Sells and Kristian (P.C. § 211), and first-degree residential
11 burglary (P.C. § 459). (Lodgment 1 at 1; 6 CT 1651-55, 1664-66).
12 The jury also found true special circumstance allegations of
13 robbery murder (P.C. § 190.2(a)(17)(A)) and burglary murder (P.C.
14 § 190(a)(17)(G)). (Lodgment 1 at 1; 6 CT 1651-55, 1664-66). After
15 a penalty trial, on August 12, 1997, the jury returned a verdict
16 of death, and the trial court imposed that sentence. (Lodgment 1
17 at 1; 6 CT 1702, 1705, 1743-48).

18
19 On April 23, 2009, the California Supreme Court affirmed the
20 judgment. (Lodgment 1 at 46). On May 1, 2009, Petitioner filed a
21 petition for rehearing. (Lodgment 2). On June 24, 2009, rehearing
22 was denied. (See Lodgment 3 at 7). Petitioner then filed a petition
23 for writ of certiorari in the United States Supreme Court, which
24 was denied on October 5, 2009. (Lodgment 4).

25
26 On October 7, 2009, Petitioner filed a habeas corpus petition
27 in the California Supreme Court, in case number S176951, followed
28

1 by an amended petition on April 22, 2013. (Lodgment 5). On May 16,
2 2018, the court issued an order to show cause, returnable in the
3 Los Angeles County Superior Court for the adjudication of one
4 claim, whether Petitioner's trial counsel provided ineffective
5 assistance at the penalty phase (Claim Four). (Lodgment 6). The
6 court denied on the merits all remaining claims, while also finding
7 that Claims Two, Six and Eight (except to the extent they alleged
8 ineffective assistance of counsel) were procedurally barred under
9 In re Waltreus, 62 Cal. 2d 218, 225 (1965), to the extent they were
10 raised and rejected on appeal; that Claim Eight (except to the
11 extent it alleged ineffective assistance of counsel) was
12 procedurally barred under In re Dixon, 41 Cal. 2d 756, 759 (1953),
13 to the extent it could have been raised on appeal but was not; and
14 that Claim Nine (except to the extent it alleged ineffective
15 assistance of counsel) was procedurally barred under In re Seaton,
16 34 Cal. 4th 193, 201 (2004), to the extent it could have been
17 raised in the trial court but was not. (Lodgment 6).

18
19 On October 15, 2021, the Los Angeles County District
20 Attorney's Office filed a Declination to Show Cause as to Claim
21 Four in the Los Angeles County Superior Court. (See Lodgment 7 at
22 45). The District Attorney's Office and Petitioner's attorneys
23 subsequently agreed to a disposition in which Petitioner would be
24 resentenced to life without the possibility of parole. On November
25 21, 2021, the petition was granted, and Petitioner was resentenced
26 to life in state prison without the possibility of parole.

(Lodgment 7 at 48; see Petition at 300-304).² The instant Petition followed on October 17, 2022.

PETITIONER'S CLAIMS

The Petition raises the following fourteen grounds for federal habeas relief:

Ground One: Petitioner was prosecuted, convicted, and sentenced while mentally incompetent to stand trial. (Petition at 52-101).

Ground Two: The prosecution's reliance on Petitioner's illegally obtained, unreliable, and involuntary statement violated his constitutional rights. (Petition at 101-144).

Ground Three: Petitioner received ineffective assistance of counsel during the guilt/innocence phase of his trial. (Petition at 144-88).

Ground Four: Petitioner received ineffective assistance of counsel based on his trial counsel's conflicting interests. (Petition at 188-97).

² Citations to the Petition utilize the page numbers provided by the Court's electronic docket.

1 Ground Five: The prosecutor's pervasive pattern of prejudicial
2 misconduct violated Petitioner's constitutional
3 rights. (Petition at 197-208).

4
5 Ground Six: Juror misconduct deprived Petitioner of his right
6 to be tried by an impartial jury. (Petition at
7 208-32).

8
9 Ground Seven: The prosecutor unlawfully exercised peremptory
10 challenges based on the racial and ethnic
11 characteristics of potential jurors. (Petition at
12 232-55).

13
14 Ground Eight: The trial court improperly excused potential
15 jurors for cause based on their equivocal
16 responses regarding the death penalty. (Petition
17 at 255-72).

18
19 Ground Nine: The trial court violated Petitioner's
20 constitutional rights by instructing the jury on
21 the uncharged crime of first-degree felony murder
22 even though Petitioner was only charged with
23 second-degree malice murder. (Petition at 272-
24 78).

25
26 Ground Ten: The trial court violated Petitioner's
27 constitutional rights by failing to require the
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1 jury to agree unanimously on whether Petitioner
2 had committed a premediated murder or a felony
3 murder before finding him guilty of first-degree
4 murder. (Petition at 278-85).

5
6 Ground Eleven: The trial court's use of outdated and erroneous
7 jury instructions violated Petitioner's due
8 process rights. (Petition at 285-88).

9
10 Ground Twelve: The trial court's failure to instruct the jury on
11 the "one continuous transaction" rule in felony
12 murder cases violated Petitioner's rights to a
13 fair trial. (Petition at 288-90).

14
15 Ground Thirteen: The imposition of higher restitution would
16 violate the California Constitution. (Petition at
17 290-91).

18
19 Ground Fourteen: There was cumulative error. (Petition at 291-95).

20
21 **DISCUSSION**

22
23 Respondent seeks dismissal due to Petitioner's failure to
24 exhaust in state court Grounds Eleven, Twelve, and Thirteen and
25 part of Ground Fourteen. (MTD Mem. at 4-8). Petitioner acknowledges
26 that these claims are unexhausted, and he seeks a stay and abeyance
27 under Rhines to allow him to exhaust these claims. (Motion for Stay
28

1 at 5, 9-19). Alternatively, in the event the Court finds a Rhines
2 stay unwarranted, Petitioner asks that his unexhausted claims be
3 dismissed and the case proceed on the remaining claims in the
4 Petition. (Motion for Stay at 19). Respondent contends that a
5 Rhines stay is unwarranted here because Petitioner fails to
6 demonstrate good cause and his unexhausted claims are plainly
7 meritless. (Opp. to Stay at 3-17).

8
9 For the reasons explained below, Petitioner has failed to
10 demonstrate good cause for a Rhines stay. Respondent's Motion to
11 Dismiss should therefore be granted; Petitioner's Motion for Stay
12 should be denied; and the Petition's unexhausted claims - Grounds
13 Eleven, Twelve, and Thirteen and part of Ground Fourteen (to the
14 extent the cumulative-error claim is predicated on the errors
15 alleged in Grounds Eleven, Twelve, and Thirteen) - should be
16 dismissed.

17
18 **A. Applicable Law**

19
20 A state prisoner must exhaust his state court remedies before
21 a federal court may consider granting habeas corpus relief. 28
22 U.S.C. § 2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838, 842
23 (1999). To satisfy the exhaustion requirement, a habeas petitioner
24 must "fairly present" his federal claims in the state courts to
25 give the state the opportunity to pass upon and correct alleged
26 violations of the petitioner's federal rights. Duncan v. Henry,
27 513 U.S. 364, 365 (1995) (per curiam). A petitioner must present
28

1 his claims to the highest court with jurisdiction to consider them
2 (typically the state supreme court) or demonstrate that no state
3 remedy is available. See Peterson v. Lampert, 319 F.3d 1153, 1156
4 (9th Cir. 2003) (en banc).

5
6 In Rhines, the Supreme Court held that the federal courts have
7 the discretion to "stay and abey[]" a federal habeas corpus
8 petition while a prisoner exhausts state remedies, but only in
9 "limited circumstances." Rhines, 544 U.S. at 277. Specifically,
10 the Court held that "stay and abeyance is only appropriate when
11 the district court determines there was good cause for the
12 petitioner's failure to exhaust his claims first in state court."
13 Id. In addition, for a stay to be appropriate, the district court
14 must determine that at least one of the petitioner's unexhausted
15 claims is not "plainly meritless" and that the petitioner has not
16 engaged in dilatory tactics. Id. at 277-78; Dixon v. Baker, 847
17 F.3d 714, 722 (9th Cir. 2017). A claim is "plainly meritless" if
18 "it is perfectly clear that the petitioner has no hope of
19 prevailing." Dixon, 847 F.3d at 722 (quoting Cassett v. Stewart,
20 406 F.3d 614, 624 (9th Cir. 2005)). If the petitioner had good
21 cause for his failure to exhaust, has potentially meritorious
22 claims, and has not engaged in abusive litigation tactics, "it
23 likely would be an abuse of discretion for a district court to deny
24 a stay and to dismiss a mixed petition." Rhines, 544 U.S. at 278.

1 **B. Analysis**

2
3 Petitioner argues that his failure to exhaust Grounds Eleven
4 and Twelve and part of Ground Fourteen was due to ineffective
5 assistance of appellate and habeas counsel,³ while his failure to
6 exhaust Ground Thirteen was due to his lack of counsel after
7 resentencing, when the basis for the claim arose. (See Motion for
8 Stay at 11-15; Petition at 43, 285 n.13). Petitioner contends that
9 his post-conviction counsel was deficient by failing to raise
10 Grounds Eleven and Twelve and part of Ground Fourteen because these
11 "are purely legal claims and are fully consistent with the claims
12 that were presented in the California Supreme Court." (Motion for
13 Stay at 12).

14
15 For the reasons explained below, Petitioner fails to
16 demonstrate sufficient basis for a stay under Rhines, at least
17 because his unexhausted claims are all plainly meritless.⁴ See
18 Rhines, 544 U.S. at 277 ("[E]ven if a petitioner had good cause
19 for th[e] failure [to exhaust], the district court would abuse its

20
21 ³ "[T]he good cause standard is satisfied when a petitioner
22 lacked the effective assistance of counsel during state
23 postconviction review proceedings." Cage v. Montgomery, 812 F.
App'x 679, 680 (9th Cir. 2020) (citing Dixon, 847 F.3d at 720-22;
Blake v. Baker, 745 F.3d 977, 982-84 (9th Cir. 2014)).

24 ⁴ In addition, because the unexhausted claims are meritless,
25 Petitioner fails to demonstrate good cause under Rhines based on
26 the ineffective assistance of post-conviction counsel, as counsel
27 was not ineffective by failing to raise meritless claims. See Boag
v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise
a meritless argument does not constitute ineffective assistance
[of counsel].").

1 discretion if it were to grant him a stay when his unexhausted
2 claims are plainly meritless.").

3
4 **1. Ground Eleven Is Plainly Meritless**

5
6 In Ground Eleven, Petitioner claims the trial court violated
7 his due process rights by using the "outdated and 'impenetrable'
8 CALJIC instructions in effect at the time of [Petitioner's] trial"
9 despite the trial court's own acknowledgement that such
10 instructions were unclear. (Petition at 287). Petitioner contends
11 that the resulting jury instructions violated due process because
12 they did not adequately inform the jury that the prosecution must
13 prove every element of the charged crimes beyond a reasonable
14 doubt. (Petition at 287-88).

15
16 Petitioner notably does not point to any particular
17 instruction that was deficient, confusing, or misleading. Instead,
18 his argument rests mainly on the fact that the CALJIC jury
19 instructions used at his trial were effectively replaced several
20 years later by a new set of instructions, CALCRIM, meant to be
21 clearer for the average juror. (Petition at 285-86). At
22 Petitioner's trial, the judge alluded to this in her instructions
23 to the jury, as follows:

24
25 [T]here is a committee who is working very hard. In fact
26 they have been working for a couple years on trying to
27 turn these instructions into English and they are
28

1 fighting so hard on every comma and period that they
2 haven't gone anywhere. [¶] So to the extent that some of
3 these [instructions] may not seem like English to you,
4 please be assured that when the attorneys have a chance
5 to argue, they'll have a chance to direct and focus your
6 attention, [and] hopefully make [the instructions] more
7 logical or reasonable.

8
9 (5 RT 877-78). Petitioner contends that his trial counsel, "despite
10 this prompting from the court, did nothing to ensure that the jury
11 understood that it must find 'every element' beyond a reasonable
12 doubt." (Motion for Stay at 16). However, Petitioner has offered
13 no basis whatsoever to show that the jury instructions were
14 insufficiently clear or unconstitutional in any respect.

15
16 "In a criminal trial, the State must prove every element of
17 the offense, and a jury instruction violates due process if it
18 fails to give effect to that requirement." Middleton v. McNeil,
19 541 U.S. 433, 437 (2004) (citing Sandstrom v. Montana, 442 U.S.
20 510, 520-21 (1979)). Yet, "so long as the court instructs the jury
21 on the necessity that the defendant's guilt be proved beyond a
22 reasonable doubt . . . the Constitution does not require that any
23 particular forms of words be used in advising the jury of the
24 government's burden of proof." Victor v. Nebraska, 511 U.S. 1, 5
25 (1994) (citations omitted). Moreover, "not every ambiguity,
26 inconsistency, or deficiency in a jury instruction rises to the
27 level of a due process violation. The question is 'whether the
28

1 ailing instruction . . . so infected the entire trial that the
2 resulting conviction violates due process.'" Middleton, 541 U.S.
3 at 437 (quoting Estelle v. McGuire, 502 U.S. 62, 72 (1991)).
4

5 Here, the trial court instructed the jury on the presumption
6 of innocence and the prosecution's burden of proving him guilty
7 beyond a reasonable doubt. The court did so, in part, by giving
8 CALJIC 2.90, as follows:
9

10 A defendant in a criminal action is presumed to be
11 innocent until the contrary is proved, and in case of a
12 reasonable doubt whether his guilt is satisfactorily
13 shown, he is entitled to a verdict of not guilty. This
14 presumption places upon the People the burden of proving
15 him guilty beyond a reasonable doubt. [¶] Reasonable
16 doubt is defined as follows: It is not a mere possible
17 doubt; because everything related to human affairs is
18 open to some possible or imaginary doubt. It is that
19 state of the case which, after the entire comparison and
20 consideration of all the evidence, leaves the minds of
21 the jurors in that condition that they cannot say they
22 feel an abiding conviction of the truth of the charge.
23

24 (6 CT 1628-29; 5 RT 892-93). The trial court also read CALJIC 2.01,
25 which provides in part:
26
27
28

1 [E]ach fact which is essential to complete a set of
2 circumstances necessary to establish the defendant's
3 guilt must be proved beyond a reasonable doubt. In other
4 words, before an inference essential to establish guilt
5 may be found to have been proved beyond a reasonable
6 doubt, each fact or circumstance on which the inference
7 necessarily rests must be proved beyond a reasonable
8 doubt.

9
10 (6 CT 1624; 5 RT 883-84). In addition, among various other
11 instructions, the court advised the jury that "each fact which is
12 essential to complete a set of circumstances necessary to establish
13 the truth of a special circumstance must be proved beyond a
14 reasonable doubt" (6 CT 1634; 5 RT 905); and that "[i]n deciding
15 whether or not to testify, [Petitioner] may choose to rely on the
16 state of the evidence and upon the failure, if any, of the People
17 to prove beyond a reasonable doubt every essential element of the
18 charge against him." (6 CT at 1627; 5 RT 890) (emphasis added).

19
20 Courts in this Circuit generally have denied due process
21 challenges to these same instructions because they adequately
22 advise the jury of the applicable burden of proof. See Lisenbee v.
23 Henry, 166 F.3d 997, 999-1000 (9th Cir. 1999) (holding that CALJIC
24 2.90 adequately described the reasonable doubt standard); Stovall
25 v. Tilton, 2011 WL 2939423, at *19-20 (C.D. Cal. June 10, 2011)
26 (by giving CALJIC 2.90 and 2.01 and by instructing jury that
27 prosecution must prove each element of the murder charge, trial
28

1 court sufficiently informed the jury that the prosecutor was
2 required to prove the charges, and all elements, beyond a
3 reasonable doubt), report and recommendation adopted, 2011 WL
4 2939420 (C.D. Cal. July 19, 2011); Tran v. Hernandez, 2009 WL
5 453108, at *8 (C.D. Cal. Feb. 23, 2009) (by giving the instructions
6 in CALJIC 2.90 as well as CALJIC 2.01, "the trial court clearly
7 instructed the jury that it must find each fact necessary to prove
8 petitioner's guilt beyond a reasonable doubt."); Jerro v. Scribner,
9 2009 WL 1217536, at *9-10 (C.D. Cal. Apr. 30, 2009) (rejecting as
10 meritless petitioner's claim that CALJIC 2.90 did not inform the
11 jury that it must find petitioner guilty beyond a reasonable doubt
12 as to each element of the offense charged); see also Victor, 511
13 U.S. at 16-17 (holding that an earlier version of CALJIC 2.90 did
14 not "suggest[] a standard of proof lower than due process requires
15 or . . . allow[] conviction on factors other than the government's
16 proof");⁵ Drayden v. White, 232 F.3d 704, 715 (9th Cir. 2000)
17 (denying habeas claim of ineffective assistance of counsel
18 predicated on counsel's failure to object to CALJIC 2.90 because
19 the instruction had been found legally sufficient in Victor).

20
21
22
23 ⁵ Victor mainly concerned the phrase "moral certainty" as used
24 in an earlier version of CALJIC 2.90. See Victor, 511 U.S. at 12-
25 17. Although the Supreme Court held that this phrase did not render
26 the instruction unconstitutional, the Court did express disapproval
27 of the phrase. Victor, 511 U.S. at 16-17. In response, California
28 subsequently omitted the phrase from the instruction. See People
v. Freeman, 8 Cal. 4th 450, 504 (1994); People v. Stone, 160 Cal.
App. 4th 323, 333 (2008). The revised, post-1994 version was used
in Petitioner's trial.

1 The mere fact that the instructions were later redrafted and
2 improved - indeed, several years after Petitioner's trial - does
3 not mean they were insufficient or unconstitutional, and Petitioner
4 has not demonstrated otherwise. Moreover, Petitioner cannot show
5 that any instructional error "so infected the entire trial that
6 the resulting conviction violates due process." Estelle, 502 U.S.
7 at 72. There is nothing in the record to suggest that the jury was
8 misled as to its obligation to find each element of the charged
9 crimes by proof beyond a reasonable doubt, nor that the jury
10 otherwise misunderstood such obligation. Ground Eleven of the
11 Petition is therefore plainly meritless.

12
13 **2. Ground Twelve Is Plainly Meritless**

14
15 Ground Twelve asserts that the trial court's failure to
16 instruct the jury on the "one continuous transaction" rule in
17 felony murder cases violated Petitioner's rights to a fair trial.
18 (Petition at 288-90). As Petitioner points out, the jury convicted
19 him of first-degree murder after being instructed on both a felony-
20 murder theory and premeditated and deliberate murder.⁶ (5 RT 898-
21 901). The trial court instructed the jury on felony murder in part
22 as follows:

23
24 Every person who unlawfully kills a human
25 being . . . during the commission or attempted

26
27 ⁶ The jury also found true special circumstances of burglary
28 and robbery. (6 CT 1665-68; 6 RT 968).

1 commission of Robbery and/or Residential Burglary, is
2 guilty of the crime of murder in violation of Penal Code
3 Section 187. [¶] In order to prove this crime, each of
4 the following elements must be proved: [¶] 1. A human
5 being was killed; [¶] 2. The killing was unlawful; and
6 [¶] 3. The killing was done with malice aforethought or
7 occurred during the commission or attempted commission
8 of the felony of Robbery or the felony of Residential
9 Burglary.

10
11 . . .

12
13 For the purposes of determining whether an unlawful
14 killing has occurred during the commission or attempted
15 commission of a residential burglary, the commission of
16 the crime of burglary is not confined to a fixed place
17 or a limited period of time. [¶] A residential burglary
18 is in progress after the original entry while the
19 perpetrator is fleeing in attempt to escape. Likewise,
20 it is still in progress so long as immediate pursuers
21 are attempting to capture the perpetrator to . . .
22 regain stolen property. [¶] A residential burglary is
23 complete when the perpetrator has eluded any pursuers
24 and reached a place of temporary safety and is in
25 unchallenged possession of stolen property after having
26 effected an escape with such property.

1 (6 CT 1630, 1632; 5 RT 896, 900).

2

3 Petitioner fails to demonstrate any error in these
4 instructions. While it is true that, as Petitioner points out, the
5 California Supreme Court has invoked the "one continuous
6 transaction" analysis as a standard for the sufficiency of evidence
7 to support a felony-murder instruction or conviction, see People
8 v. Sakarias, 22 Cal. 4th 596, 624 (2000), there no requirement that
9 the killing and the felony be part of one continuous transaction.
10 See Lopez v. Stainer, 494 F. App'x 778, 779 (9th Cir. 2012)
11 ("[U]nder California law,] that a felony and homicide are 'one
12 continuous transaction' is a sufficient condition to satisfy the
13 statutory requirement [that the murder be committed 'in
14 perpetration of' the underlying felony] but not a necessary one."
15 (emphasis added)); Khan v. Lopez, 2013 WL 4013630, at *9 (N.D. Cal.
16 Aug. 5, 2013) ("[U]nder California law, the 'one continuous
17 transaction' analysis does not establish an element of the
18 offense[;] rather, it is used as an appellate standard of review
19 to determine whether there was sufficient evidence to support an
20 instruction or a conviction on felony-murder. While evidence of a
21 single continuous transaction may be sufficient to justify an
22 instruction or conviction on felony murder, it is the jury's role
23 to determine whether a murder was committed in the perpetration of
24 the underlying felony, not whether the murder took place as part
25 of a single continuous transaction." (citing Sakarias, 22 Cal. 4th
26 at 624)). As such, there is certainly no requirement to include
27 the "one continuous transaction" rule in the felony murder
28

1 instructions to the jury.⁷ See, e.g., Lopez v. Stainer, 494 F.
2 App'x at 779 (rejecting instructional error claim because
3 California does not require instruction on "one continuous
4 transaction" rule for felony murder conviction); Khan, 2013 WL
5 4013630, at *9 (same). Thus, Ground Twelve of the Petition is
6 plainly meritless.

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9
10 ⁷ In addition, even if California did require this, a mere
11 violation of state law would not entitle Petitioner to federal
12 habeas relief. See Gilmore v. Taylor, 508 U.S. 333, 342 (1993)
13 ("[I]nstructions that contain errors of state law may not form the
14 basis for federal habeas relief."); Dunckhurst v. Deeds, 859 F.2d
15 110, 114 (9th Cir. 1988) (instructional error "does not alone raise
16 a ground cognizable in a federal habeas corpus proceeding"); Lewis
17 v. Runnels, 2009 WL 5195965, at *6 (E.D. Cal. Dec. 21, 2009) ("This
18 state law question of whether the trial court violated California
19 caselaw when it gave an 'escape rule' jury instruction, as opposed
20 to an instruction on 'one continuous transaction,' is not
21 cognizable in this federal habeas corpus proceeding." (citing
22 Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991))), aff'd,
23 472 F. App'x 778 (9th Cir. 2012); see also Langford v. Day, 110
24 F.3d 1380, 1389 (9th Cir. 1996) ("[Petitioner] may not, however,
25 transform a state-law issue into a federal one merely by asserting
26 a violation of due process."). "Petitioner has not cited any United
27 States Supreme Court case holding that, for purposes of due process
28 and the felony-murder rule, a jury instruction must inform the jury
that a homicide is committed in the perpetration of a felony only
if the killing and the felony are part of one continuous
transaction." Lewis, 2009 WL 5195965, at *7. Claims which
effectively raise only state law issues are plainly meritless under
the Rhines test. See Avila v. Kirkland, 249 F. App'x 695, 696 (9th
Cir. 2007) (claim challenging a "state law determination" on a jury
instruction failed "to present a federal constitutional question"
and was therefore meritless under Rhines); Gordon v. Montgomery,
2023 WL 2629028, at *4 (C.D. Cal. Feb. 8, 2023) ("Federal courts
repeatedly have concluded that claims that are not cognizable on
federal habeas review, particularly claims that raise only state
law concerns, are plainly meritless under the Rhines test."
(citations omitted)), report and recommendation adopted, 2023 WL
2749136 (C.D. Cal. Mar. 30, 2023).

1 **3. Ground Thirteen Is Plainly Meritless**

2

3 In Ground Thirteen, Petitioner claims that the trial court

4 violated the California Constitution by imposing additional

5 restitution when resentencing him, despite that he already had paid

6 the restitution fine that was originally assessed. (Petition at

7 290-91). Because this claim does not “attack[] . . . the legality

8 or duration of [Petitioner’s] confinement[,]” Crawford v. Bell,

9 599 F.2d 890, 891 (9th Cir. 1979),⁸ it is not cognizable in this

10 federal habeas action. See Bailey v. Hill, 599 F.3d 976, 984 (9th

11 Cir. 2010) (§ 2254 “does not confer jurisdiction over a habeas

12 corpus petition raising an in-custody challenge to a restitution

13 order.”); Messer v. Montgomery, 2023 WL 2277544, at *16 (E.D. Cal.

14 Feb. 28, 2023) (pursuant to Baily, dismissing individual habeas

15 claim challenging restitution fine), report and recommendation

16 adopted, 2023 WL 3168352 (E.D. Cal. Apr. 28, 2023); Ruffin v.

17 Gastelo, 2021 WL 6845544, at *22 (C.D. Cal. Dec. 8, 2021) (same),

18 report and recommendation adopted, 2022 WL 393193 (C.D. Cal. Feb.

19 9, 2022); Galvan v. Adams, 2010 WL 2606254, at *8 (E.D. Cal. June

20 28, 2010) (same). As such, Ground Thirteen is plainly meritless.

21 See Adams v. Paramo, 2016 WL 11518348, at *6 (C.D. Cal. Jan. 20,

22 2016) (“An example of a ‘plainly meritless’ claim is one that is

23 not even cognizable under Section 2254.” (citations omitted)).

24

25 _____

26 ⁸ “[T]he essence of habeas corpus is an attack by a person in

27 custody upon the legality of that custody, and . . . the

28 traditional function of the writ is to secure release from illegal

custody[.]” Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).

1 **4. The Unexhausted Portion of Ground Fourteen Is Plainly**
2 **Meritless**

3
4 As noted above, Ground Fourteen asserts cumulative error (see
5 Petition at 291-95) and is unexhausted only to the extent it is
6 predicated on the errors alleged in Grounds Eleven, Twelve, and
7 Thirteen. Because such claims lack merit for the reasons explained
8 above, Ground Fourteen is also plainly meritless to the extent it
9 is predicated on the errors in such claims.

10
11 **5. Petitioner's Unexhausted Claims Should Be Dismissed**

12
13 Because Grounds Eleven, Twelve, and Thirteen and the
14 unexhausted part of Ground Fourteen are plainly meritless, a Rhines
15 stay is not warranted to exhaust such claims. As such, the Petition
16 is subject to dismissal as a mixed petition containing both
17 unexhausted and exhausted claims. See Rose v. Lundy, 455 U.S. 509,
18 522 (1982) ("[A] district court must dismiss habeas petitions
19 containing both unexhausted and exhausted claims."). Yet, the Court
20 "may not dismiss a mixed petition without giving the petitioner
21 the opportunity to delete the unexhausted claims." Dixon, 847 F.3d
22 at 719 (quoting Valerio v. Crawford, 306 F.3d 742, 770 (9th Cir.
23 2002)). Here, as noted above, Petitioner requests that the Court
24 dismiss the unexhausted claims, if a Rhines stay is denied, so that
25 Petitioner may proceed solely on the exhausted claims in the
26 Petition (*i.e.*, Grounds One through Ten and the remaining portion
27 of Ground Fourteen). (See Motion for Stay at 19). Accordingly, as
28

Petitioner has failed to demonstrate sufficient grounds for a Rhines stay, his unexhausted claims – Grounds Eleven, Twelve, and Thirteen and part of Ground Fourteen (to the extent the claim is predicated on the errors alleged in Grounds Eleven, Twelve, and Thirteen) – should be dismissed.⁹

RECOMMENDATION

For the reasons discussed above, it is recommended that the district court issue an Order: (1) accepting this Report and Recommendation; (2) granting Respondent's Motion to Dismiss (Dkt. No. 16) to the extent it seeks dismissal of the Petition's unexhausted claims; (3) denying Petitioner's Motion for Stay (Dkt. No. 21); and (4) dismissing without prejudice Grounds Eleven, Twelve, and Thirteen and part of Ground Fourteen (to the extent

⁹ Petitioner has not requested a stay under the alternative procedure set forth in Kelly v. Small, 315 F.3d 1063 (9th Cir. 2002), overruled on other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007). Regardless, a stay under Kelly would likely be inappropriate here for the same reason addressed above, that Petitioner's unexhausted claims are meritless. See Kelly, 315 F.3d at 1070 (a stay is appropriate "when valid claims would otherwise be forfeited" (emphasis added)); see also Carter v. Broomfield, 2022 WL 18276326, at *1 (C.D. Cal. Dec. 7, 2022) ("[U]nder both Rhines and Kelly, a stay is not appropriate where it would be futile because, for example, the unexhausted claims are plainly meritless."), report and recommendation adopted, 2023 WL 172012 (C.D. Cal. Jan. 12, 2023); Montes v. Frauenhiem, 2020 WL 2139334, at *2 (C.D. Cal. Feb. 26, 2020) (same).

1 the claim is predicated on the errors alleged in Grounds Eleven,
2 Twelve, and Thirteen) for failure to exhaust state court remedies.

3
4 DATED: September 15, 2023

5
6 /s/
ALKA SAGAR
7 UNITED STATES MAGISTRATE JUDGE
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10 **NOTICE**

11
12 Reports and Recommendations are not appealable to the Court
13 of Appeals, but may be subject to the right of any party to file
14 Objections as provided in Local Civil Rule 72 and review by the
15 District Judge whose initials appear in the docket number. No
16 Notice of Appeal pursuant to the Federal Rules of Appellate
17 Procedure should be filed until entry of the Judgment of the
18 District Court.
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